



INTRODUCTION TO ENVIRONMENTAL LAW

FALL 2005

VOLUME I

PROF. ANDREW GREEN

BORA LASKIN LAW LIBRARY

AUG 26 2005

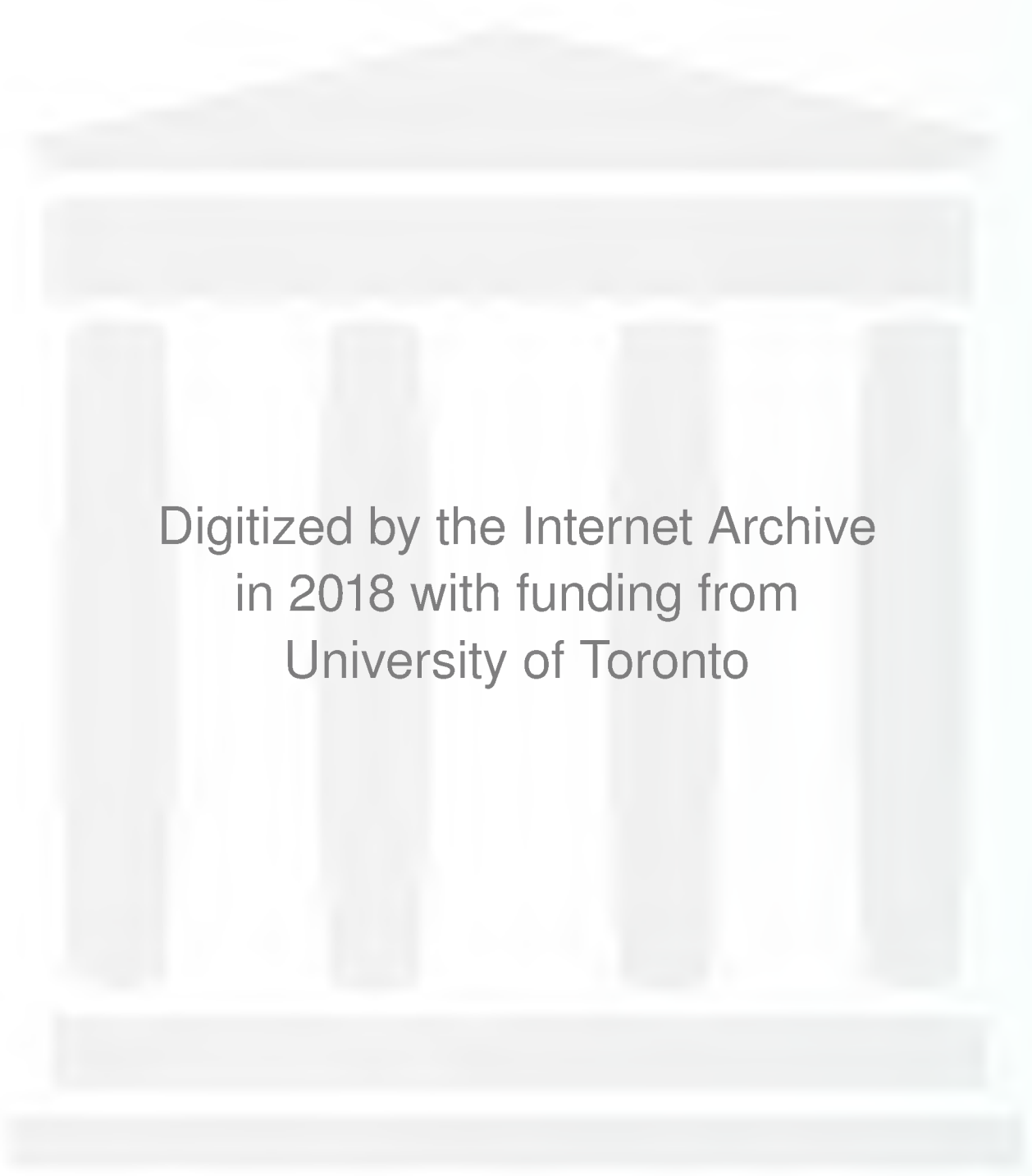
FACULTY OF LAW
UNIVERSITY OF TORONTO

INTRODUCTION TO ENVIRONMENTAL LAW

FALL 2005

VOLUME I

PROF. ANDREW GREEN



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/introductiontoen01gree>

ENVIRONMENTAL LAW

FALL 2005

Professor Andrew Green

416-946-8333

Falconer 303

a.green@utoronto.ca

TABLE OF CONTENTS

I THE PROBLEM AND APPROACHES

D. Boyd, <i>Unnatural Law: Rethinking Canadian Environmental Law and Policy</i> (Vancouver: UBC Press, 2003), Ch. 1: "Canada's Environmental Record	1
K. Harrison and W. Antweiler, "Incentives for Pollution Abatement: Regulation, Regulatory Threats and Non-Governmental Pressures" (2003) 22(3) J. Policy Analysis and Management 361 [Excerpt].....	7
G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243 [Excerpt].....	19
R. Coase, <i>The Firm, The Market, and The Law</i> (Chicago: University of Chicago Press, 1988), Ch. 5: "The Problem of Social Cost" [pp. 95-104, 114-119].....	22
Aldo Leopold, <i>A Sand County Almanac</i> (New York: Oxford University Press, 1966) [pp. 217- 241].....	31
C. Stone, "Should Trees have Standing? – Towards Legal Rights for Natural Objects" (1972) 45 Southern Cal. L.R. 450 [Title page, pp. 458-481].....	44
C. Giagnocavo and H. Goldstein, "Law Reform or World Re-form: The Problem of Environmental Rights" (1990) 35 McGill L.J. 345 [pp. 375-386].....	57
"2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship", Yale Center for Environmental Law and Policy, Center for International Earth Science Information Network, Columbia University (formally released in Davos, Switzerland, at the annual meeting of the World Economic Forum on Friday, 28 January 2005) [pp.27-35].....	64
"Taking Stock: 2002 North American Pollutant Releases and Transfers", Commission for Environmental Cooperation of North America. [pp. 106-111, 121-123].....	73

II COMMON LAW

J. Benedickson, <i>Environmental Law (2d)</i> (Toronto: Irwin Law, 2002), Ch. 5: “Civil Liability for Environmental Harm”.....	82
<i>McKie v. The K.V.P. Co.</i> , [1948] O.R. 398 (Ont. High Ct.).....	100
<i>McKie v. The K.V.P. Co.</i> , [1949] 1 D.L.R. 39 (Ont. C.A.).....	102
<i>The K.V.P. Co. v. McKie</i> , [1949] S.C.R. 698.....	105
<i>British Columbia v. Canadian Forest Products Ltd.</i> , 2004 SCC 38 [Excerpt].....	109
F. Ackerman and L. Heinzerling, <i>Priceless</i> (New York: The New Press, 2004) [pp. 153-165].....	125

Class Actions

<i>Hollick v. Toronto (City)</i> (2001), 42 C.E.L.R. (N.S.) 26 (S.C.C.).....	132
<i>Pearson v. Inco Ltd.</i> (2002), 33 C.P.C. (5 th) 264 (Ont. Sup. Ct. J.).....	142
<i>Pearson v. Inco Ltd.</i> (2004), 44 C.P.C. (5 th) 276 (Ont. Sup. Ct. J., Div. Ct.).....	166
T. Camus, “Sydney Families File \$1-billion Suit” <i>Halifax Herald</i> (March 25, 2004)...	173
T. Collier MacDonald. “Another 80 People to Join Lawsuit” <i>Cape Breton Post</i> (August 30, 2003).....	175

Statutory Reforms

<i>Environmental Bill of Rights</i> , S.O. 1993, c. 28, s. 84.....	176
--	-----

III CONSTITUTIONAL JURISDICTION

Theory

R. Revesz and R. Stavins, “Environmental Law and Policy” for A.M. Polinsky and S. Shavell, eds., <i>The Handbook of Law and Economics</i> (Amsterdam: North-Holland/Elsevier Science, 2004) [pp. 56-61].....	178
D. Esty, “Revitalizing Environmental Federalism” (1996) 95(3) Mich. L.R. 570 [Excerpts].....	184

Federal/Provincial Relations

- Harrison, “Federal-Provincial Relations and the Environment: Unilateralism, Collaboration and Rationalization” in D. VanNijnatten and R. Boardman, eds., *Canadian Environmental Policy: Context and Cases* (Toronto: Oxford University Press, 2001), p. 123.....196
- R. v. Crown Zellerbach Canada Ltd.* (1988), 49 D.L.R. (4th) 161 (S.C.C.) [pp. 161-77, 183-89, 193-196, 200-4].....208
- R. v. Hydro Quebec* (1997), 151 D.L.R. (4th) 32 (S.C.C.) [pp. 32-36, 43-44, 56-61, 63-64, 67-69, 71-76, 77-79, 96-102, 113-6].....227

Local Government

- 114957 *Canada Ltee. v. Hudson (Town)* (2001), 200 D.L.R. (4th) 419 [pp. 419-27, 432-445].....252
- Croplife Canada v. Toronto (City)*, [2005] O.J. No. 1896.....264

Aboriginal

- T. McClenaghan, “Why Should Aboriginal Peoples Exercise Governance Over Environmental Issues” (2002) 51 UNB LJ 211.....286
- Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.....297
- Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74.....316

IV REGULATORY APPROACH

Overview

- J. Benedickson, *Environmental Law (2d)* (Toronto: Irwin Law, 2002), Ch. 6: “Environmental Regulations and Approvals”.....329

Standards

- D. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003), Ch. 3.3: “Air Pollution”.....338
- K. Arrow, et al., “Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?” (1996) 272 *Science* 221.....347

F. Ackerman and L. Heinzerling, <i>Priceless</i> (New York: The New Press, 2004) [pp. 35-40; 66-75].....	349
C. Sunstein, <i>Risk and Reason</i> (Cambridge: Cambridge University Press, 2002), Ch. 5: “Reducing Risks Rationally” [pp. 99-113, 120-132].....	358
D. Farber, “From Here to Eternity: Environmental Law and Future Generations” (2003) 2 U. Ill. L.R. 289 [pp. 289-308].....	373
D. Dana, “A Behavioral Economic Defense of the Precautionary Principle” (2003) 97 Nw. U.L.R. 1315 [pp.1315-1320, 1327-1335].....	384
ECO Report, <i>Keep the Door to Environmental Protection Open</i> (Special Report to the Legislative Assembly of Ontario, 1996).....	398
D. Macdonald, “The Business Response to Environmentalism” in D. VanNijnatten and R. Boardman, eds., <i>Canadian Environmental Policy: Context and Cases</i> (Toronto: Oxford University Press, 2001) [pp. 74-75, 79-81].....	407
External Advisory Committee on Smart Regulation, <i>Smart Regulation: A Regulatory Strategy for Canada</i> (September 2004) [14-69].....	410

Approvals and Orders

J. Benedickson, <i>Environmental Law (2d)</i> (Toronto: Irwin Law, 2002), Ch. 7: “Administrative Compliance Mechanisms”.....	466
ECO Report, <i>The EBR Litigation Rights: A Survey of Issues and Six Year Review</i> (Background Paper for EBR Litigation Rights Workshop, 2000) [pp. 1-12].....	474
<i>Re 724597 Ontario Ltd., Re</i> (1994), 13 C.E.L.R. (N.S.) 257 (O.E.A.B.).....	486
<i>Dillon et al. v. Director, MOE</i> (2002), 45 C.E.L.R. (N.S.) 9 (O.E.R.T.).....	512

Prohibitions and Prosecutions

D. Boyd, <i>Unnatural Law: Rethinking Canadian Environmental Law and Policy</i> (Vancouver: UBC Press, 2003), Ch. 2.2: “Water Pollution”.....	543
ECO, <i>Annual Report 2000/02</i> , [Excerpts].....	550
<i>R. v. MacMillan Bloedel (Alberni) Ltd.</i> (1979), 47 C.C.C. (2d) 118 (B.C.C.A.).....	563

<i>Fletcher v. Kingston (City)</i> (1998), 28 C.E.L.R. (N.S.) 229 (Prov. Div.) [paras. 1-22].....	566
<i>Fletcher v. Kingston (City)</i> 2004 CarswellOnt 1860 (Ont. C.A.).....	571
<i>R. v. Inco</i> (2001), 54 O.R. (3d) 495.....	588
<i>R. v. Imperial Oil</i> (2000), 36 C.E.L.R. (N.S.) 109 (B.C.C.A.).....	599
<i>R. v. Bata Industries Ltd.</i> (1992), 9 O.R.(3d) 329 (Prov. Div.).....	605
<i>R. v. Bata Industries Ltd</i> (1995), 25 O.R. (3d) 321 (C.A.).....	624
<i>Bill 133 Environmental Enforcement Statute Law Amendment Act</i> , S.O. 2005, c. 12, ss.1	630
<i>R. v. BHP Diamonds Inc.</i> 2003 W.C.B.J. 2560, 56 W.C.B. (2d) 278.....	679
B. Pardy, <i>Applying the Precautionary Principle to Private Persons: Should it Affect Civil and Criminal Liability?</i> (2002) 43 C. de D. 63.....	714

Public Participation

C. Sunstein, <i>Risk and Reason</i> (Cambridge: Cambridge University Press, 2002), Ch. 4: “This Month’s Risk”.....	722
<i>B.C. (Minister of Forests) v. Okanagan Indian Band</i> [2003] 3 S.C.R. 371.....	733
C. Tollefson, “Strategic Lawsuits and Environmental Politics: <i>Daishowa Inc. v. Friends of the Lubicon</i> ” (1996) 31(1) J. Canadian Studies 119.....	750
<i>Algonquin Wildlands League v. Ontario (MNR)</i> (1996), 21 C.E.L.R. (NS) 102 (Ont. Ct. J., Gen. Div.).....	762
<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> (1998), 13 Admin. L.R. (3d) 280 (Fed. Ct., Trial Div.).....	765
<i>Society for the Preservation of the Englishman River Estuary v. Nanaimo (Regional District)</i> (1999), 28 C.E.L.R. (N.S.) 253 (B.C.S.C.).....	778
<i>Sierra Club of Western Canada v. British Columbia (Attorney General)</i> (1991), 83 D.L.R. (4 th) 708 (B.C.S.C.).....	789
<i>Canadian Parks & Wilderness Society v. Superintendent of Banff National Park</i> (1993), 23 Admin. L.R. (2d) 6 (Fed. Ct., Trial Div.).....	794

Caddy Lake Cottagers Assn. v. Florence-Nora Access Road Inc. (1998), 26 C.E.L.R. (N.S.) 322 (Man. C.A.).....801

Friends of Point Pleasant Park v. Canada (Attorney General) (2000), 38 C.E.L.R. (N.S.) 45 (Fed. Ct., Trial Div.).....803

Environmental Assessment

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 88 D.L.R. (4th) 1 (S.C.C.).....812

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 1-8, 11-40.....824

Canadian Environmental Assessment Agency, “Basics of Environmental Assessment”, www.ceaa-acee.gc.ca/010/basics_e.htm.....861

Citizens’ Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of Environment) [1999] F.C.J. No. 273 (Fed. Ct., Trial Div.) [Excerpts].....872

Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) [2000] 2 F.C. 263 (C.A.).....883

Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) [2001] 2 F.C. 461 (C.A.).....902

Inverhuron & District Ratepayers’ Assn. v. Canada (Minister of the Environment) [2001] F.C.J. No. 1008 (C.A.).....931

Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage) [2003] 4 F.C. 672 (C.A.).....947

Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans) [2003] F.C.J. No. 366 (Trial Div.).....971

A. Levy, “A Review of Environmental Assessment in Ontario” (2002) 11(2) J.E.L.P. 173 [pp. 173, 194-221].....989

Sutcliffe v. Ontario (Minister of Environment) (2003), 2 C.E.L.R. (3d) 303 (Div. Ct.).....1004

Sutcliffe et al. v. Minister of the Environment (Ontario) et al. [2004] O.J. No. 3473, 72 O.R. (3d) 2131017

<i>R. v. Ontario Realty Corporation</i> (Unreported).....	1026
---	------

V “NEW” INSTRUMENTS

Command and Control v. Economic Instruments

B. Ackerman and R. Stewart, “Reforming Environmental Law” (1985) 37 <i>Stan. L.R.</i> 1333. [pp. 1333-1341].....	1041
--	------

W. Wagner, “The Triumph of Technology Based Standards” (2000) <i>U. Ill. L.R.</i> 83.....	1046
---	------

R. Revesz and R. Stavins, “Environmental Law and Policy (Draft Chapter)” for A.M. Polinsky and S. Shavell, eds., <i>The Handbook of Law and Economics</i> (Amsterdam: North-Holland/Elsevier Science, 2004) [pp. 50-54].....	1062
--	------

Carol Rose, “Rethinking Environmental Controls: Management Strategies for Common Resources” (1991) <i>Duke L.J.</i> 1.....	1067
--	------

GOC, Project Green, <i>Moving Forward on Climate Change: A Plan For Honouring our Kyoto Commitment</i> (2005).....	1087
--	------

R. Posner, <i>Catastrophe: Risk and Response</i> [2004: OUP] (pp.155-165).....	1136
--	------

Voluntary Mechanisms

K. Harrison, “Voluntarism and Environmental Governance” in E. Parson, ed. <i>Governing the Environment: Persistent Challenges, Uncertain Innovations</i> (Toronto: University of Toronto Press, 2001) (excerpts).....	1142
---	------

C. Coglianese, “Is Consensus an Appropriate Basis for Regulatory Policy?” in E. Orts and K. Deketelaere, eds., <i>Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe</i> (London: Kluwer Law International, 2001).....	1153
--	------

Green Consumerism

K. Harrison and W. Antweiler, “Toxic Release Inventories and Green Consumerism: Empirical Evidence from Canada” (2003) 36(2) <i>Canadian J. Economics</i> 495 [pp. 495-500, 518-519].....	1164
---	------

C. Sunstein, <i>Risk and Reason</i> (Cambridge: Cambridge University Press, 2002), Ch. 10: “Tools” [pp. 251-269].....	1171
---	------

Marketable Permits

- R. Stavins, “Market-Based Environmental Policies: What Can We Learn from U.S. Experience (and Related Research)” (July 2, 2003).....1181
- J.R. Nash and R. Revesz, “Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants” (2001) 28 *Ecology LQ* 569 [pp. 569-82; 614-29].....1199
- L. Heinzerling, “Selling Pollution, Forcing Democracy” (1995) 14 *Stan.Env.L.J.* 300.....1215
- K. Wyman, “Why Regulators Turn to Tradeable Permits: A Canadian Case Study” (2002) 52 *U.T.L.J.* 419 [pp. 419-426, 487-502].....1227
- MOE, Technical Report on Emissions Trading Regime.....1234

VI WHERE NOW?

- James Gustave Speth, *Red Sky at Morning* (Yale University Press 2004) [pp. 191-201].....1240
- T. Anderson and D. Leal, *Free Market Environmentalism* (New York: Palgrave, 2001) [pp. 1-8].....1246
- R. Stewart, “A New Generation Of Environmental Regulation?” (2001), 29 *Cap. U. L. Rev.* 21 [pp. 151-182].....1251
- M. Shellenberger and T. Nordhaus, “The Death of Environmentalism: Global Warming Politics in a post-environmental world” (released at an October 2004 meeting of the Environmental Grantmakers Association).....1267